

ORIGINAL

EX PARTE OR LATE FILED

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K STREET, NW, SUITE 300  
WASHINGTON, DC 20007-5116  
TELEPHONE (202) 424-7500  
FACSIMILE (202) 424-7645  
WWW.SWIDLAW.COM

MICHAEL L. SHOR  
DIRECT DIAL (202) 424-7775  
MLSHOR@SWIDLAW.COM

NEW YORK OFFICE  
919 THIRD AVENUE  
NEW YORK, NY 10022-9998  
(212) 758-9500 FAX (212) 758-9526

June 9, 2000

**VIA COURIER**

Magalie Roman Salas, Esq.  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: **NOTICE OF EX PARTE MEETINGS**

CC Docket No. 00-52

Petition of Starpower Communications, LLC for Preemption of the Jurisdiction of  
the Virginia State Corporation Commission

Dear Ms. Salas:

Pursuant to Section 1.1206(b)(1) and (2) of the Commission's rules, 47 C.F.R. Section 1.1206(b)(1) and (2), this letter will provide notice that on June 8, 2000, Russell Blau and Patrick Donovan had an *ex parte* meeting with Mr. Kyle Dixon, of Commissioner Powell's office, and on June 9, 2000, Mr. Donovan and I had an *ex parte* meeting with Mr. Jordan Goldstein, of Commissioner Ness's office, regarding the referenced docket. In both *ex parte* meetings, we discussed the petition for preemption of the Virginia State Corporation Commission regarding interconnection disputes between Starpower and Bell Atlantic-Virginia and GTE South, Inc.; specifically, Bell Atlantic's and GTE's failure to compensate Starpower for the transport and termination of ISP-bound traffic. We urged the Commission to preempt the jurisdiction of the Virginia State Corporation Commission and to resolve the interconnection disputes.

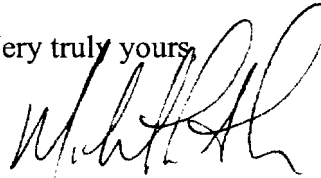
We advised Mr. Goldstein that Starpower's appeal to the United States District Court for the Eastern District of Virginia from the Virginia Corporation Commission's decision to decline jurisdiction over the interconnection disputes seeks only a determination that the Virginia Commission failed to exercise its discretion properly; the appeal does not ask the District Court to interpret the underlying merits of the dispute or otherwise address the substance of the case. For your convenience, a copy of the Petition for Appeal filed in the District Court, without exhibits, is attached hereto.

No. of Copies rec'd 072  
List ABCDE

Magalie Roman Salas, Esq.  
June 9, 2000  
Page 2

Please date stamp the enclosed copy of this letter and return it to the undersigned with the waiting messenger. Thank you for your assistance and cooperation.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Michael L. Shor', written over the typed name.

Michael L. Shor

cc: Dorothy Atwood  
Jordan Goldstein  
Kyle Dixon  
Sarah Whitesell  
Rebecca Beynon  
Jake E. Jennings  
Julie Patterson  
Suzon Cameron  
Deborah Royster  
Joe Kahl  
Russell Blau  
Patrick Donovan

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION**

STARPOWER COMMUNICATIONS, LLC,  
a Delaware Limited Liability Company,

Plaintiff,

v.

THE VIRGINIA STATE CORPORATION  
COMMISSION, CLINTON MILLER,  
HULLIHEN W. MOORE, AND  
THEODORE V. MORRISON, in their  
official capacity as Commissioners of the  
Virginia State Corporation Commission,  
BELL ATLANTIC-VIRGINIA, INC.,  
a Virginia corporation, and  
GTE SOUTH, INCORPORATED.,  
a Virginia corporation,

Defendants.

FEB 23 2000

CIVIL ACTION NO. 00-308-A

**PETITION FOR JUDICIAL REVIEW AND  
COMPLAINT FOR DECLARATORY JUDGMENT**

**NATURE OF THE ACTION**

1. Starpower Communications, LLC ("Starpower"), by its undersigned counsel, brings this action pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 252(e)(6) seeking judicial review of the Virginia State Corporation Commission's ("Commission") decisions in *Petition of Starpower Communications, LLC For Declaratory Judgment Interpreting Interconnection Agreement with GTE South, Inc.*, Case No.PUC990023 (Jan. 24, 2000) ("*Starpower/GTE Decision*") and *Petition of Starpower Communications, LLC For Declaratory Judgment and Enforcement of Interconnection*

*Agreement with Bell Atlantic-Virginia, Inc.*, Case No. PUC99-156 (Feb. 9, 2000) (“*Starpower/BA-VA Decision*”) (collectively, the “Complaint Proceedings”).<sup>1</sup>

2. In the Complaint Proceedings, the Commission declined jurisdiction over disputes between Starpower and Bell Atlantic-Virginia, Inc. (“BA-VA”) and GTE South, Incorporated (“GTE”) concerning the payment of reciprocal compensation for traffic terminated to Internet service providers (“ISPs”) under contracts that Starpower had entered into with GTE and BA-VA. The Commission improperly declined jurisdiction based upon “the possibility of conflicting results being reached by this Commission and the [Federal Communications Commission (“FCC”)]”<sup>2</sup> and the erroneous belief that its only basis for exercising jurisdiction over the disputes lay in a statement by the FCC, which, according to the Commission, conferred regulatory jurisdiction over the matter to the state commissions.<sup>3</sup> Rather than exercising jurisdiction over the Complaint Proceedings and resolving the issue, as it had done in previous proceedings addressing the same issue, the Commission directed the parties to seek redress before the FCC.

3. Starpower seeks an order of the Court reversing the *Starpower/BA-VA Decision* and the *Starpower/GTE Decision* and directing the Commission to hear and to consider the disputes at issue in the Complaint Proceedings as required by 47 U.S.C. § 252 and applicable rulings of the FCC and such other relief as this Court may find appropriate.

### **THE PARTIES**

4. Plaintiff Starpower is a Delaware limited liability company with its principal place of business in Washington, D.C. Starpower is authorized by the Commission to provide local exchange telecommunications services in the Commonwealth of Virginia.

---

<sup>1</sup> Copies of these decisions are attached hereto as Exhibits 1 and 2.

<sup>2</sup> *Starpower/GTE Decision*, slip op. at 6.

<sup>3</sup> *Id.*, slip op. at 6-7.

5. Defendant Commission is an agency of the Commonwealth of Virginia responsible for, among other things, the regulation of telecommunications services and telecommunications carriers in the Commonwealth.

6. Defendants Clinton Miller, Hulihan W. Moore, and Theodore V. Morrison are the current sitting Commissioners of the Commission and acted as such in the decisions at issue in this proceeding. The Commissioners are sued in their official capacity as Commissioners for declaratory relief only.

7. Defendant BA-VA is a Virginia corporation, with its principal place of business in Virginia. Defendant's BA-VA's registered agent in Virginia is Robert W. Woltz, Jr., President, Bell Atlantic-Virginia, Inc., 600 East Main, Suite 1100, Richmond, Virginia 23219. BA-VA is authorized by the Commission to provide local exchange telecommunications services in portions of the Commonwealth of Virginia and is an incumbent local exchange carrier ("ILEC") as defined in the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 252(h).

8. Defendant GTE is a Virginia corporation with its principal place of business in Dallas, Texas. GTE's registered agent in Virginia is Edward Parker, 5511 Staples Mill Road, Richmond, Virginia 23228. GTE is authorized by the Commission to provide local exchange telecommunications services in portions of the Commonwealth and is an ILEC as defined in the Act, 47 U.S.C. § 252(h).

### **JURISDICTION AND VENUE**

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 252(e)(6) and personal jurisdiction over the Defendants.

10. Venue is proper in this district under 28 U.S.C. §§ 1391(a) and (b).

11. This is an "appropriate federal district court" within the meaning of 47 U.S.C. § 252(e)(6).

## **BACKGROUND**

### **Obligations Imposed By The Act**

12. Starpower, BA-VA, and GTE are local exchange carriers providing competing local telephone services in the Commonwealth pursuant to authority granted by the Commission.

13. One of the primary goals of the Act is to bring about the development of competition in the nation's local exchange markets. To this end, the Act requires ILECs to afford competitive local exchange carriers ("CLECs") such as Starpower the ability to "interconnect" with the ILEC network at any technically feasible point on a nondiscriminatory basis.<sup>47</sup> In addition, both ILECs and CLECs must "establish reciprocal compensation arrangements for the transport and termination of telecommunications." The FCC has determined that the obligations under this subsection of the Act "apply only to traffic that originates and terminates within a local area . . . ."<sup>48</sup> Nothing in the Act or applicable FCC regulations prevent ILECs and CLECs from agreeing to compensate each other for the transfer and termination of traffic bound for ISPs.

14. Thus, if a contract provides for reciprocal compensation, when an ILEC customer places a call to a customer served by a CLEC within the same local calling area, the ILEC must compensate the CLEC for taking the call onto its network and delivering the call to the CLEC customer (and vice versa when a CLEC customer calls an ILEC customer). This provision, along with the interconnection duty imposed upon the ILECs, is of pivotal importance to the development of a competitive market because together they provide a mechanism for CLECs and ILECs to exchange, and to then pay for the exchange of, traffic between their networks.

---

<sup>47</sup> 47 U.S.C. § 251(c)(2)(B).

<sup>48</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16013, at ¶ 1034 *modified on recon.*, 11 FCC Rcd 13042 (1996) ("Local Competition Order"), *vacated in part, Iowa Utils Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999).

15. In the interest of ensuring that these obligations are fulfilled in the local exchange market, the Act requires CLECs and ILECs to enter into agreements governing the circumstances, terms and conditions under which they will interconnect their networks to facilitate the exchange of traffic. 47 U.S.C. §251. Authority over these “interconnection agreements” is vested in the hands of state regulatory commissions (such as the Commission).

16. The process begins when a CLEC asks an ILEC to commence negotiations.<sup>6</sup> The parties then have a statutorily defined period of time within which to reach a voluntary agreement. If the negotiations fail, either party may then petition the relevant state commission to arbitrate any open issues.<sup>7</sup> The Act also permits CLECs to “opt-in” to any or all of the terms and conditions of a previously approved interconnection agreement.<sup>8</sup>

17. Once the parties have arrived at either a voluntarily negotiated or adopted agreement, or an arbitrated resolution, the final contract must be approved by the state commission.<sup>9</sup> The Act delegates authority to the state commissions to review the contents of these agreements and sets out the manner in which that authority is to be exercised.<sup>10</sup>

#### **Commission Exercise of Delegated Authority**

18. In the exercise of the authority bestowed upon it by the Act, the Commission has, on several prior occasions, exercised jurisdiction over interconnection agreements by and between

---

<sup>6</sup> 47 U.S.C. § 252(a)(1).

<sup>7</sup> *Id.* at § 252(b)(1).

<sup>8</sup> Section 252(i) provides that: “A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.”

<sup>9</sup> 47 U.S.C. § 252(e)(6).

<sup>10</sup> 47 U.S.C. § 252(e)(2).

CLECs and ILECs. The Commission has considered and approved over 250 interconnection agreements negotiated by CLECs and ILECs. In addition, the Commission has arbitrated agreements between BA-VA and Cox Virginia Telecom, Inc., TCG, MCIMetro Access, AT&T, and Transwire and between GTE and Cox Virginia Telecom, Inc., MCI Metro Access, Covad, and AT&T.

19. In addition to the state commissions' authority under 47 U.S.C. §252(e)(2) to approve or reject interconnection agreements, it is generally held that state commissions retain the authority to interpret and enforce interconnection agreements they have approved.<sup>11</sup> The Commission previously exercised jurisdiction over and decided a complaint virtually identical to those filed by Starpower in the proceedings below. Specifically, in *Petition of Cox Virginia Telecom, Inc. For Enforcement of Interconnection Agreement with Bell Atlantic-Virginia, Inc. and Arbitration Award for Reciprocal Compensation for the Termination of Local Calls to Internet Service Providers*, Case No. PUC970069 (Oct. 24, 1997) ("*Cox Telecom*"), the Virginia Commission considered a complaint by Cox Virginia Telecom, Inc. against BA-VA for an order declaring that local calls to ISPs constitute local traffic for purposes of reciprocal compensation payments under its agreement with BA-VA.

20. Notably, in *Cox Telecom*, the Commission did not even consider the jurisdictional issue that caused it to dismiss Starpower's complaints. Instead, the Commission directly addressed the merits of the dispute raised by Cox and held that "calls to ISPs as described in the Cox petition

---

<sup>11</sup> See, e.g., *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8<sup>th</sup> Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999) ("state commissions' plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved"); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98, Notice of Proposed Rulemaking in CC Docket No. 98-68, 14 FCC Rcd. 3689, 3702

¶ 22 ("*Declaratory Ruling*") (interconnection agreements are "interpreted and enforced by the state-commissions"); *Bell Atlantic-Virginia, Inc. v. WorldCom Techs. of VA., Inc.*, 70 F. Supp.2d 60, 626 (E.D. Va. 1997) ("This Court finds that the Telecommunications Act was designed to allow the state commission to make the first determination").



constitute local traffic under the terms of the agreement between Cox and BA-VA and that the companies are entitled to reciprocal compensation for the termination of this type of call.”<sup>12</sup>

### **FCC View on Commission Jurisdiction Over Inter-Carrier Compensation Disputes**

21. In its *Declaratory Ruling* released on February 26, 1999, the FCC clarified certain questions surrounding inter-carrier compensation for ISP-bound traffic. One of those questions was the authority and jurisdiction of state commissions to resolve the disputes. The FCC acknowledged that, “because the Commission had not addressed inter-carrier compensation under these circumstances,” it was up to “*the state commissions charged with interpreting* [interconnection agreements] . . . to determine as a matter of first impression how interconnecting carriers should be compensated for delivering traffic to ISPs.”<sup>13/</sup>

22. The FCC concluded that, for jurisdictional purposes, calls placed to ISPs are “largely interstate” based upon the “ultimate destination or destinations.”<sup>14/</sup> Nonetheless, the FCC added that historically it had treated calls to ISPs as local and, in the absence of a federal rule governing inter-carrier compensation, state commissions had the jurisdiction to determine whether reciprocal compensation should be paid for ISP-bound traffic.<sup>15/</sup>

### **Proceedings Below**

23. Pursuant to section 252(i) of the Act, 47 U.S.C. § 252(i), Starpower elected to adopt the interconnection agreement by and between BA-VA and MFS Intelenet of Virginia, Inc. (“MFS”), which had been approved by the Commission in Case No. PUC960110 (the “BA-VA Agreement”).

---

<sup>12</sup> *Cox Telecom, supra*, slip op. at 2.

<sup>13</sup> *Declaratory Ruling*, 14 FCC Rcd at 3695, ¶ 9 (emphasis added).

<sup>14</sup> *Id.* at 3697, ¶ 12.

<sup>15</sup> *See, e.g., Declaratory Ruling*, 14 FCC Rcd. at 3703, ¶ 21; 3704, ¶ 24; 3706, ¶ 26.

Starpower's adoption of the BA-MFS Agreement was approved by the Commission on June 17, 1998 in Case No. PUC980061.

24. Starpower also elected under section 252(i) to adopt the interconnection agreement by and between GTE and MFS, which had been approved by the Commission in Case No. PUC970007 (the "GTE Agreement").

25. Section VI.A. of the GTE Agreement requires GTE and Starpower to "reciprocally terminate POTS calls originating on each others' networks"<sup>16</sup> and section VI.B. requires GTE and Starpower to pay reciprocal compensation to each other for the termination of local traffic at "an equal, identical and reciprocal rate of \$.009 per minute."

26. Section 5.7.2. of the BA-VA Agreement provides that "the Parties shall compensate each other for transport and termination of Local Traffic in an equal and symmetrical manner at the rate provided in the Detailed Schedule of Itemized Charges (Exhibit A of the Agreement.)" The rates set forth in Exhibit A are \$.003 per minute of use for end office termination and \$.005 per minute of use for tandem termination.

27. Pursuant to the respective agreements, Starpower interconnected its network with GTE's and with BA-VA's and began exchanging traffic with both ILECs.

28. In the ordinary course of business, Starpower submitted invoices to GTE and BA-VA seeking, in part, compensation for the exchange of traffic, including ISP-bound traffic.

29. Separately, GTE and BA-VA declined and refused to pay Starpower for a substantial portion of the invoiced amounts. GTE and BA-VA both contended that, notwithstanding the Commission's prior order in *Cox Telecom* and the FCC's *Declaratory Ruling*, they were not obligated to compensate Starpower for ISP-bound traffic.

---

<sup>16</sup> "POTS" is defined as: "Plain Old Telephone Service Traffic," which the parties agreed included "local traffic (including EAS) as defined in GTE's tariff." (GTE Agreement, section II.FF.).

30. Section XVIII of the GTE Agreement, and Section 29.9 of the BA-VA Agreement, provide that the parties to each agreement have the right to petition the Commission, or a Court, for resolution of any dispute arising under the agreement.

31. On February 3, 1999, Starpower filed with the Commission a petition seeking a declaratory ruling directing GTE to pay reciprocal compensation for Starpower's transport and termination of GTE's traffic to ISPs served by Starpower. In particular, Starpower's petition asked the Commission to determine whether calls to ISPs constituted "local traffic" for purposes of the definition of "POTS traffic" in the GTE Agreement.

32. By order dated June 22, 1999, the Commission docketed Starpower's complaint in Case No. PUC990023 and directed GTE to file a response to Starpower's complaint. The Commission further directed the parties to address the impact, if any, of the FCC's *Declaratory Ruling* on the merits of the dispute and "this Commission's subject matter jurisdiction."

33. On or about July 7, 1999, GTE filed its response to Starpower's complaint in which GTE argued, in part, that even though the FCC had declared the traffic at issue to be interstate, the Commission had subject matter jurisdiction to decide, as a matter of contract law, whether the parties had agreed to compensate each other for ISP-bound traffic.

34. Starpower filed its reply on or about July 19, 1999, contending that the Commission had jurisdiction over the reciprocal compensation dispute based on the provisions of the Act and in various pronouncements of the FCC, all as interpreted by various courts that had considered the issue.

35. On September 15, 1999, Starpower filed a complaint against BA-VA seeking enforcement of the BA-VA Agreement and a determination that ISP traffic is local traffic for purposes of reciprocal compensation under the BA-VA Agreement. In particular, Starpower's

complaint asked the Commission to determine whether calls to ISPs are including within the definition of "local traffic" in the BA-VA Agreement.

36. On January 24, 2000, the Commission issued a Final Order declining jurisdiction over Starpower's complaint against GTE.

37. In declining jurisdiction, the Commission cited the FCC's *Declaratory Ruling* on inter-carrier compensation for ISP traffic and its *Separations Reform Order*,<sup>17/</sup> finding that "the FCC's failure to act on either inter-carrier compensation or separations reform for ISP-traffic... has created great regulatory uncertainty."<sup>18/</sup> The Commission further stated that, notwithstanding the FCC's stated intent to leave intact state commission decisions on the issue, in the absence of any FCC rules on inter-carrier compensation, "any interpretation of the instant agreements we might reach may well be inconsistent with the FCC's final order in its rulemaking."<sup>19/</sup> Accordingly, the Commission concluded that the only practical solution was for it to decline jurisdiction and allow the parties to pursue their cases with the FCC.

38. In a subsequent order issued February 4, 2000, the Commission dismissed Starpower's complaint against BA-VA for the reasons set forth in the *Starpower/GTE Decision*, and encouraged Starpower to seek appropriate relief from the FCC.<sup>20/</sup>

### **COUNT I**

(Review of Commission Decision Declining Jurisdiction)

39. Starpower incorporates Paragraphs 1-38 as though fully set forth herein.

---

<sup>17/</sup> *In re Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Notice of Proposed Rulemaking, 12 FCC Rcd. 22120 (1997) ("*Separations Reform Order*").

<sup>18/</sup> *Starpower/GTE Decision*, slip op. at 5.

<sup>19/</sup> *Id.*, slip op. at 6.

<sup>20/</sup> *Starpower/BA-VA Decision*, slip op. at 4.

40. Section 252(e) of the 1996 Act, 47 U.S.C. § 252(e), grants state commissions the authority to review and approve or reject interconnection agreements.<sup>21</sup> The Commission's authority to approve or reject interconnection agreements necessarily carries with it the authority to interpret and enforce agreements that it has approved.

41. The Commission's authority to interpret and enforce the provisions of interconnection agreements it has approved extends to the disputes at issue in the proceedings below, and in particular to the determination of whether calls terminating to ISPs are within the definitions of "local traffic" in the respective agreements.

42. Starpower is entitled to have its complaints addressing the terms of its interconnection agreements with BA-VA and GTE heard by the Commission -- the agency specifically authorized to interpret and enforce those agreements. The Commission's failure to do so impedes the development of competition envisioned by Congress and effectuated by the 1996 Act.

43. Given its statutory duty to interpret and enforce interconnection agreements, the Commission erred in declining jurisdiction over Starpower's complaints in the proceedings below.

WHEREFORE, Starpower respectfully requests that this Court reverse the decisions and direct the Commission to exercise the jurisdiction imposed by the Act and to consider and resolve the complaints on their merits.

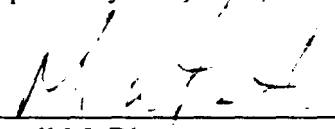
---

<sup>21</sup> Section 252(e) states that "state commissions shall approve or reject the agreement, with written deficiencies." 47 U.S.C. § 252(e).

**REQUEST FOR RELIEF**

FOR THE FOREGOING REASONS, Starpower prays for an order reversing the Virginia Commission's decisions and remanding these proceedings to the Commission with instructions to hear and consider the merits of Starpower's complaints, and such other and further relief as this Court may deem just and reasonable.

Respectfully submitted,



---

Russell M. Blau  
Michael L. Shor (Va. Bar No. 28478)  
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007  
(202) 424-7500  
(202) 424-7645

Counsel for Starpower Communications, LLC

Dated: February 23, 2000